APPENDIX

Statutes Involved

TITLE 49 U. S. C. 905(a):

> "It shall be the duty of every common carrier by water, * * * to establish, observe, and enforce just and reasonable rates, fares, charges and classifications, and just and reasonable regulations and practices, relating thereto and to the issuance, form, and substance of tickets, receipts, bills of lading, and manifests. * * * All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

TITLE 49 U. S. C. 906:

> "(a) Every common carrier by water shall file with the Commission, and print, and keep open to public inspection tariffs showing all rates, fares, charges, classifications, rules, regulations, and practices for the transportation in interstate or foreign commerce of passengers and property between places on its own route, * * *
>
> (c) No common carrier by water shall charge or demand or collect or receive a greater or less or different compensation * * * than the rates, fares, or charges specified for such transportation or such service in the tariffs lawfully in effect; * * *"

TITLE 46 U. S. C. 1304(2j):

> "(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting

from—(j) strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: Provided, That nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts."

TITLE 46 U. S. C. 1304(4):

"Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of this chapter or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom: Provided, however, That if the deviation is for the purpose of loading or unloading cargo or passengers it shall, prima facie, be regarded as unreasonable."

Opinion Below

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 338—October Term, 1955

(Argued April 12, 1956—Decided June 1, 1956)

Docket No. 23995

HIRSCH LUMBER COMPANY,

Plaintiff-Appellant,

v.

WEYERHAEUSER STEAMSHIP COMPANY,

Defendant-Appellee.

Before:

CLARK, *Chief Judge*,
HINCKS and LUMBARD, *Circuit Judges*.

Hirsch Lumber Company, the purchaser and assignee of bills of lading made subject to the Carriage of Goods by Sea Act, sued the carrier, Weyerhaeuser Steamship Company, for return of $33,837.32 paid in freight for delivery of lumber at Port Newark, New Jersey, which lumber was unloaded at Baltimore, Maryland due to a strike at Port Newark and the Port of New York during January 1955.

Plaintiff appeals from a jury verdict for the defendant in the Southern District of New York, Vincent L. Leibell, District Judge. Affirmed.

MAX ORNSTEIN, New York City, for plaintiff-appellant.

DOW & SYMMERS, New York City (William G. Symmers, Frederick Fish, William Warner, of counsel on the brief), for defendant-appellee.

LUMBARD, *Circuit Judge*:

This appeal raises two questions: First, whether bills of lading under which lumber was to be carried by sea from Olympia, Washington to Port Newark, New Jersey, could lawfully provide that freight was immediately due upon delivery of the lumber to the carrier even though the lumber was not delivered to point of destination because of a strike at Port Newark. The second question is whether there was evidence to sustain the jury's finding that the carrier's delivery of the lumber to Baltimore because of the strike was a reasonable diversion under the Carriage of Goods by Sea Act, 46 U. S. C. A. § 1304, and the provisions of the bills of lading.

Hirsch Lumber Company was the purchaser of one bill of lading and the assignee of the purchasers of seven other bills of lading, all covering shipments from Olympia, Washington to Port Newark, New Jersey, on the Western Trader, a liberty ship under $50,000 per month time charter to the carrier, Weyerhaeuser Steamship Company. Hirsch sued for return of freight paid in the total of $33,827.32, with interest and other charges, on the ground that Weyerhaeuser had not earned the freight because it failed to deliver the lumber at Port Newark. In the alternative Hirsch sought the reasonable cost of transporting the lumber from Baltimore to Port Newark, plus handling and terminal charges, which allegedly totalled approximately $34,850.

The Western Trader arrived at New York Harbor on January 3, 1955 and completed discharging lumber not covered by Hirsch's bills of lading at Brooklyn on Janu-

ary 6. Her next port of discharge was to be Atlantic Terminals, Port Newark, and her final port was Independent Terminals, also at Port Newark.

Commencing January 3 a picket line had been established at Atlantic Terminals by striking lumber-handling employees who were members of Local 478 Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. L. At this time the steamship W. L. McCormick, owned and operated by Weyerhaeuser, was berthed at Atlantic Terminals, having arrived with a cargo of lumber on January 1. When the McCormick was shifted to Bayway Terminals in Port Newark on January 4 a picket line prevented her unloading there. After the Western Trader had unloaded her Brooklyn cargo she anchored off Staten Island on January 6 and remained there until January 14. The strike continued until April 5, 1955.

Considerable evidence was introduced by Weyerhaeuser tending to show that there was good reason to conclude that the lumber could not have been discharged at Port Newark or elsewhere in the Port of New York. Various of defendant's employees testified that representatives of the union on strike had stated that they would establish a picket line at any place where any vessel with cargo consigned to Atlantic Terminals might berth. As already stated, pickets had followed Weyerhaeuser's McCormick to Bayway Terminals in Port Newark on January 4 and had thereby prevented her unloading there. Not all of the lumber covered by the bills of lading involved here was consigned to Atlantic Terminals, but there was evidence to show that the Western Trader was so loaded that the Atlantic Terminals lumber had to be discharged before any of the other lumber could be reached.

On January 6 Weyerhaeuser commenced an action against the officers of the striking union in the District Court for New Jersey. An application for an injunction against picketing any of Weyerhaeuser's vessels at Newark

or in the Port of New York, heard on January 12 by order to show cause signed on January 7, was denied on the ground that the National Labor Relations Board had primary jurisdiction. Following this, on January 13, Weyerhaeuser filed a complaint with the Board.

Captain Lawrence Howard, a vice-president and director of Weyerhaeuser, testified that he sought permission of the Port of New York Authorty to berth the Western Trader at a puble terminal pier in Port Newark, but that this was refused. This was corroborated by Captain Robert Schulze, general manager of the Marine Operations Division of the Port of New York Authority. Edward J. Carroll, general superintendent of the Nacirema Operating Company, who was a member of the Conference Committee of the New York Shipping Association, which represents the shipping companies in negotiating collective bargaining agreements with the International Longshoremen's Association, also testified for the defendant. He was handling the unloading of the McCormick and the Western Trader and he contacted various officials of the I. L. A. in an effort to get the ships unloaded. Each official with whom he talked advised him that the longshoremen would respect a picket line.

After the failure of all these attempts to find a means of unloading in Newark or the Port of New York Weyerhaeuser learned that labor in Baltimore would not honor pickets from Newark. Accordingly the Western Trader left New York on January 14 and steamed to Baltimore where she commenced discharging the lumber on January 15. The pickets did follow the Western Trader to Baltimore and established a picket line at the terminal there, but despite this the lumber was unloaded.

The plaintiff sought to show that part or all of the Western Trader's lumber could have been unloaded at the Independent Terminals in Port Newark or the Gowanus Terminals in Brooklyn. Thus Mr. Hall, president of the

Independent Terminals testified that he was ready, willing and able to berth and unload the Western Trader. He qualified this, however, by stating that he would not have attempted to unload "hot cargo" consigned to the Atlantic Terminals. Mr. Garbutt, terminal manager of the Gowanus Terminals, testified that in his opinion the Western Trader could have been unloaded at his Terminals in Brooklyn.

The eight bills of lading all provided that the lumber was to be delivered at Port Newark, New Jersey and they all contained the word "Collect" next to the amount of the freight indicating that the freight was to be paid on delivery. They provided in Clause 11:

> "Freight, whether prepaid or collect, becomes wholly due and belongs absolutely to Carrier as soon as the Goods are received by Carrier, and shall be deemed earned, and if prepaid shall not be returnable, and if collect shall be payable, ship and/or cargo lost or not lost."

They provided further in Clause 6 that in case of any event which in the judgment of the carrier or master is likely to make it unsafe or imprudent

> "* * * for any reason * * * to * * * discharge the cargo at the port of discharge, or to give rise to delay or difficulty in * * * discharging at * * * the port of discharge, the master, either with or without * * * attempting to * * * discharge the goods there * * * may * * * stop at such place as he or the Carrier may consider safe or advisable under the circumstances * * * and there discharge the cargo * * * and when so discharged the cargo shall be at the risk and expense of shippers and/or consignees or receivers, and delivery thereof by the Carrier shall be considered complete and the Carrier

> shall be freed from any further responsibility in respect thereof; * * * The forwarding of cargo from a port of distress or other place where there has been a forced interruption or abandonment of the voyage shall be at the expense of the shipper and consignee of the goods, * * *."

By Clause 1 of the bills of lading incorporated the Carriage of Goods by Sea Act, 46 U. S. C. A. §§ 1300-1315, which provides in § 1312 that a bill of lading which covers a carriage of goods between seaports of the United States may provide that it is subject to this Act. Sec. 1304(2)(j) provides that the carrier shall not be responsible for loss or damage resulting from "strikes * * * or stoppage or restraint of labor from whatever cause, whether partial or general: * * *." The Act further provides in § 1304(4) that a reasonable deviation shall not be deemed a breach of the contract of carriage and that a deviation for the purpose of unloading cargo shall prima facie be regarded as unreasonable.

If these provisions of the bills of lading are lawful, the carrier may retain the entire freight if failure to deliver the lumber at Port Newark was reasonable under the circumstances, and if it was reasonable to have unloaded the lumber at Baltimore on January 15, 1955.

Judge Leibell ruled that the provisions of the bills of lading were valid and accordingly instructed the jury that Weyerhaeuser was entitled to the freight for the carriage of the lumber if it sustained the burden of showing that delivery of the lumber to Baltimore was reasonable because of the strike and the labor stoppage at Port Newark and the Port of New York. We agree with Judge Leibell that the provisions of the bills of lading are valid. That bills of lading may provide that freight is earned even

though the cargo is not delivered to the designated port is well established. Alcoa Steamship Co. v. United States, 338 U. S. 421, 422 (1949); Allanwilde Transport Corp. v. Vacuum Oil Co., 248 U. S. 377 (1919); International Paper Company v. The Schooner "Gracie D. Chambers", 248 U. S. 387 (1919); Standard Varnish Works v. Steamship "Bris", 248 U. S. 392 (1919).

Under the Carriage of Goods by Sea Act a reasonable deviation to unload cargo does not subject the carrier to liability for any loss or damages resulting, although the carrier has the burden of showing that it was reasonable. 46 U. S. C. A. § 1304(4). If the carrier can show that the deviation was due to a strike or stoppage or restraint of labor, the same Act expressly provides that he shall not be responsible for resulting loss. 46 U. S. C. A. § 1304 (2)(j). In Kroll v. Silver Line, Ltd., 116 F. Supp. 443 (N. D. Cal. S. D., 1953) where the bills of lading contained provisions similar to those here in question, the District Court held it reasonable to deliver cargo enroute from Calcutta to Los Angeles, at Tacoma, Washington, the nearest open port to Los Angeles, which, with other ports, was closed by the general Maritime strike of 1948. The Court found it unnecessary to resort to the Carriage of Goods by Sea Act since there was no deviation; the contract expressly sanctioned an alternate place of delivery in the event of labor trouble. The libellants were denied recovery of their costs in transporting the cargo to Los Angeles from Tacoma.

A December 1955 decision of the Court of Appeals of England in G. H. Renton & Co., Ltd. v. Palmyra Trading Corporation of Panama reported in Weekly Law Reports for January 20, 1956 (1956) 2 W. L. R. 232, deals with a somewhat similar diversion of a shipment of timber from British Columbia to London and Hull under bills of lading providing that with respect to goods loaded in Canada the Water Carriage of Goods Act, 1936, of the Dominion of

Canada [1] shall be effective. In that case the agreed facts were that the carrier unloaded the lumber at Hamburg, conceded to be the nearest convenient port if discharge at any port other than London and Hull was lawful, because it was impossible to discharge the cargo at London and Hull due to strikes and labor troubles. The bill of lading contained provisions as follows:

> 14(c) "Should it appear that * * * labour troubles * * * would prevent the vessel from * * * entering the port of discharge or there discharging in the usual manner and leaving again, all of which safely and without delay, the master may discharge the cargo at the port of loading or any other safe and convenient port."
>
> 14(f) "The discharge of any cargo under the provisions of this clause shall be deemed the fulfillment of the contract."

The Court of Appeals held the carrier had made proper delivery under its contract and was not liable for any expenses or losses incurred by the shipper by reason of discharge of the lumber at Hamburg. Thus whether we rely on the Carriage of Goods by Sea Act or merely on paragraphs 6 and 11 of the bills of lading we must conclude that if the carrier acted reasonably in proceeding to Baltimore it is entitled to its freight.

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[1] The Canadian Act of 1936, the British Act of 1924, and laws of other countries, like our own statute of 1936, 46 U. S. C. A. §§ 1300-1315, were all adopted following the Brussels Convention of 1924 and the adoption by many countries of the "Hague Rules". The purpose of these conventions and acts was to simplify and make uniform the provisions of ocean bills of lading and the rights of shippers and carriers. See Note, 23 Va. Law Rev. 590 (1937). See also 1 Benedict on Admiralty 291-92 (6th ed. 1940); 6 Benedict on Admiralty 154 et seq. (6th ed. 1941). Although our act covers only foreign commerce, it may be incorporated into domestic bills of lading as was done in the case at bar. 46 U. S. C. A. § 1312.

Judge Leibell fairly and correctly left to the jury the reasonableness of Weyerhaeuser's discharge of the lumber at Baltimore. After summarizing the pertinent provisions of the bills of lading and the sections of the Act, including that which provided that a deviation to unload cargo was prima facie to be regarded as unreasonable, he charged that "the propriety of the deviation is a fact question of inherent reasonableness depending on all the surrounding circumstances." And after summarizing the evidence he charged:

> "If you conclude that the carrier was justified in deciding that it could not make delivery in Port Newark or the Port of New York and that Baltimore was the nearest port at which the carrier could be reasonably sure of making delivery, then the deviation in the voyage of the Western Trader from New York to Baltimore was reasonable and proper, or you may so conclude."

And he again charged as to burden of proof that it was upon the defendant "to show that the deviation was reasonable under all the circumstances * * * by a fair preponderance of the evidence." After the conclusion of the main charge, and at the plaintiff's request, this instruction as to burden of proof was repeated by the Court.

Thus, after a clear, careful and thorough charge from the Court, the jury found for the defendant. There was ample evidence to justify their verdict and the judgment is affirmed.

Judgment Below

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 1st day of June, one thousand nine hundred and fifty-six.

Present:

HON. CHARLES E. CLARK,
Chief Judge,
HON. CARROLL C. HINCKS,
HON. J. EDWARD LUMBARD,
Circuit Judges.

HIRSCH LUMBER COMPANY,
Plaintiff-Appellant,

v.

WEYERHAEUSER STEAMSHIP COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed; with costs taxed in favor of the appellee.

A. DANIEL FUSARO,
Clerk.

Office - Supreme Court, U
FILED
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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956

No. 341

HIRSCH LUMBER COMPANY,
Petitioner,

against

WEYERHAEUSER STEAMSHIP COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

WILLIAM G. SYMMERS
FREDERICK FISH
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INDEX

	PAGE
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statute Involved	2
Statement	2
Argument	6
I. The Decision Below is Clearly Correct	6
II. There is No Conflict of Decision	7
Conclusion	9
Appendix A—Statutes	10
B—Provisions of the Bill of Lading	11-12

CITATIONS

Cases:

Alcoa Steamship Co. v. The United States, 338 U. S. 421, (1949)	7, 8
Atlanticfile Transport Corp. v. Vacuum Oil Co., 248 U. S. 377, 385 (1919)	7
International Paper Co. v. The Oracle D. Chambers, 248 U. S. 387 (1919)	7
Nevell, et al. v. Silver Line, Limited, et al. (D. C. N. D. Cal., S. D., 1953) 116 F. Supp. 443	6

PAGE

Pope and Talbot, Inc. v. *Guernsey Westbrook* (9th Cir., 1947) 159 F. 2d 139 8

G. H. Renton and Co., Ltd., v. *Palmyra Trading Corporation of Panama*, [1956] 1 Q. B. 462 ... 8

Standard Varnish Works v. *The Bris*, 248 U. S. 392 (1919) 7

Toyo Kisen v. *W. R. Grace and Co.*, (9th Cir., 1931), 53 F. 2d 740, affirming 48 F. 2d 850 (D. C. N. D. Cal., S. D. 1931) 8

STATUTE:

Carriage of Goods by Sea Act, Act of April 16, 1936, 49 Stat. §§ 1207-1213, 46 U. S. C. A. §§ 1300-1315 .....2, 6, 10

In the

Supreme Court of the United States

October Term, 1956

Hirsch Lumber Company, *Petitioner,* against Weyerhaeuser Steamship Company, *Respondent.*	No. 341

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

Opinion Below

The opinion of the Court of Appeals for the Second Circuit (pp. 17-25 of Petition) is not yet reported.

Jurisdiction

The jurisdictional requisites are set forth in the Petition.

Questions Presented

I

Whether bills of lading under which lumber was to be carried by sea from Olympia, Washington to Port Newark, New Jersey could lawfully provide that freight was immediately due upon delivery of the lumber to the carrier even though the lumber was not delivered to point of destination because of a strike at Port Newark.

II

Whether there was evidence to sustain the jury's finding that the carrier's delivery of the lumber to Baltimore because of the strike was a reasonable diversion under the Carriage of Goods by Sea Act, 46 U. S. C. A. sec. 1304, and the provisions of the bills of lading.

Statute Involved

The statutory provisions involved are sections 1210(2)(j), 1210(4) and 1212 of 49 Stat. §§ 1207-1213, 46 U. S. C. §§ 1300-1315, of the Carriage of Goods by Sea Act, 1936, Act of April 16, 1936. They are printed in Appendix A, *infra*, p. 10.

Statement

This litigation involving eight (8) bills of lading arose out of the inability of the respondent, Weyerhaeuser Steamship Company, to deliver lumber carried by sea from Olympia, Washington at Port Newark, New Jersey because of a strike at the latter port. The lumber was delivered at Baltimore, Maryland. The petitioner, Hirsch Lumber Company, brought suit in its own behalf as purchaser of one of the

bills of lading and as the assignee of the alleged claims of A. R. Hall Lumber Company and Channel Lumber Company, purchasers of other bills of lading.

The steamship WESTERN TRADER, a liberty ship under time charter to the respondent, Weyerhaeuser Steamship Company, loaded a full cargo of lumber in November and December, 1954 at ports on the West Coast of the United States for Brooklyn, New York and Port Newark, New Jersey. She arrived at New York Harbor on January 3, 1955 and moored at a pier at the foot of Green Street, Brooklyn. She completed discharging lumber destined for Brooklyn on January 6, 1955. She was stowed so that her next port of discharge was Atlantic Terminals, Port Newark, New Jersey and her final port of discharge was Independent Terminals, Port Newark, New Jersey. Only part of the lumber scheduled for discharge at Port Newark was carried under the bills of lading involved here. Because of a strike by certain lumber handling employees of the Atlantic Terminals, Port Newark, the WESTERN TRADER proceeded to an anchorage off Stapleton, Staten Island, New York on January 6, 1955 where she remained until January 14, 1955. [R. 1a-2a]

The strike began on January 1, 1955. The employees involved were members of Local 478, Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L. who stack and "back-pile" lumber after it is discharged from a vessel to the wharf. The picket line was established by the striking workers at Atlantic Terminals, Port Newark on January 3, 1955. The strike continued until April 5, 1955 when a new collective bargaining agreement was entered into between the Atlantic Terminals and the union involved which represented the lumber handlers. [R. 2a-3a]

When the strikers began picketing at Atlantic Terminals, Port Newark, New Jersey on January 3, 1955 the steamship

W. L. McCormick, a liberty ship owned and operated by the respondent, Weyerhaeuser Steamship Company, was berthed at Atlantic Terminals. She had arrived from the West Coast of the United States with a full load of lumber on Saturday, January 1, 1955. An attempt was made to circumvent the picket line by shifting the McCormick from Atlantic Terminals to Bayway Terminals in Port Newark on January 4, 1955. The pickets followed the McCormick to Bayway Terminals and established a picket line which was recognized and respected so that no lumber could be discharged from the McCormick at Bayway Terminals. Members and representatives of the collective bargaining group on strike stated on several occasions that they would establish a picket line at any place where any vessel with cargo consigned to Atlantic Terminals berthed. In fact they did follow the Western Trader to Baltimore as set forth below. [R. 4a-6a]

On January 6, 1955 the respondent filed a complaint in the United States District Court for the District of New Jersey against the officers of the union on strike. On January 7, 1955 the Court signed an order returnable January 12, 1955 to show cause why the striking union should not be restrained from picketing any vessel owned or chartered and operated by the respondent at the Port of Newark in the State of New Jersey and the Port of Greater New York. The application of the respondent for an injunction against the officers of the striking union was denied on the grounds that the Court lacked jurisdiction because the proceeding was one over which the National Labor Relations Board had jurisdiction both to entertain the grievance and determine it fully. The respondent also filed a complaint against the striking union with the National Labor Relations Board on January 13, 1955. [R. 6a-8a]

In addition, the respondent requested permission from the Port of New York Authority to berth the Western

TRADER at one of the public terminal piers in Port Newark. The Port Authority refused to permit the respondent to dock the WESTERN TRADER or any vessel with lumber scheduled for discharge at Atlantic Terminal aboard at any of its public terminal berths. Independent Terminal's berth and Bayway Terminal's berth are public terminal berths. [R. 8a-10a]

Moreover, the respondent through the New York Shipping Association, which represents management in collective bargaining with the International Longshoremen's Association and its affiliated crafts in the shipping industry, endeavored to arrange for the discharge of the WESTERN TRADER in the Port of Greater New York without success. The respondent also caused inquiries to be made of the representatives of the locals of the International Longshoremen's Association in different areas of New York Harbor and were advised that the longshoremen would respect a picket line. [R. 10a-12a]

Finally assurances were received by the respondent from Baltimore that a picket line from Newark would not deter labor in Baltimore from discharging the vessel. The WESTERN TRADER weighed anchor and proceeded to Baltimore on January 14, 1955. The MCCORMICK was also sent to Baltimore. Members of the striking local kept their threat and went from Port Newark to Baltimore and established a picket line at the lumber terminal in Baltimore where the WESTERN TRADER and the MCCORMICK were berthed. The workmen in Baltimore ignored the picket line and both vessels were discharged. [R. 5a, 12a-13a]

The action was tried before a jury in the United States District Court for the Southern District of New York. The jury rendered a verdict for the defendant. The Court of Appeals for the Second Circuit unanimously affirmed the judgment of the District Court.

Argument

The decision of the lower court turns solely upon an analysis of the particular facts involved which was decided adversely to the petitioner by a jury. There is no issue to warrant review by this Court. The petitioner does not cite any litigation pending in our courts involving the issue presented. Indeed, despite the frequent strikes on the American waterfront and the consequent diversions of cargo to ports other than their original destination, there is only one reported case involving the point raised here since the Carriage of Goods by Sea Act was passed twenty years ago. *Kroll et al.* v. *Silver Line, Limited, et al.* (N. D. Cal., S. D. 1953) 116 F. Supp. 443.

I

THE DECISION BELOW IS CLEARLY CORRECT

It is expressly permitted by § 1312 of the Carriage of Goods by Sea Act, 46 U. S. C. §§ 1300-1315 to make a bill of lading covering carriage between United States ports subject to the Act. Clause 1 of the bills of lading involved incorporated the Carriage of Goods by Sea Act. Sec. 1304 (2)(j) of the Act provides that the carrier shall not be responsible for loss or damage resulting from "strikes * * * or stoppage or restraint of labor from whatever cause, whether partial or general; * * *". The Act further provides in § 1304(4) that a reasonable deviation shall not be deemed a breach of the contract of carriage and that a deviation for the purpose of unloading cargo shall *prima facie* be regarded as unreasonable. Under the Act the carrier is not liable for any loss or damage resulting from a reasonable deviation to unload cargo, although the carrier has the burden of showing that it was reasonable.

In the District Court the reasonableness of the respondent's discharge of the lumber at Baltimore was left to the jury. There was ample evidence to justify the jury's verdict for the respondent.

II

THERE IS NO CONFLICT OF DECISION

Ocean bills of lading clauses providing that freight shall be earned although the goods are never delivered to the designated port have been repeatedly sustained. *Allanwilde Transport Corp.* v. *Vacuum Oil Co.*, 248 U. S. 377 (1919); *International Paper Co.* v. *The Gracie D. Chambers*, 248 U. S. 387 (1919); *Standard Varnish Works* v. *The Bris*, 248 U. S. 392 (1919).

In *Alcoa Steamship Co.* v. *United States*, 338 U. S. 421 (1949), the Court said:

> "It is a principle of American maritime law that ocean carrier freight charges are not earned unless and until the goods are delivered to destination. But contractual provisions establishing the shipper's liability for freight regardless of actual delivery have been uniformly held valid, and have become common stipulations in carriers' bills of lading." (p. 422)

In the *Allanwilde* case, 248 U. S. 377 (1919), Mr. Justice McKenna for the Court said:

> "The provision was not idle or accidental. It is easy to make a charge of injustice against it, if we consider only the defeat of the voyage and non-carriage of the cargo. But there are opposing considerations. There were expected hazards and contingencies in the adventure and we must presume that the contract was framed in foresight of both and in provision for both." (p. 385)

Accordingly, the clauses in the bills of lading providing that the freight shall be earned although the goods are not delivered to the designated port are valid. The pertinent provisions of the bill of lading are set forth in Appendix B, *infra*, pp. 11-12.

The decisions cited by petitioner are not in conflict with the decision of the Court below. In *Alcoa Steamship Co.* v. *United States*, 338 U. S. 421 (1949) the Court construed two documents, the carrier's commercial form bill of lading and the controlling government form bill of lading. The Court found that the terms of the government bill of lading were inconsistent with the "freight earned" clause in the carrier's commercial form bill of lading and, therefore, that the United States was not liable for the freight. At bar we are only concerned with the carrier's bill of lading which contains a valid "freight earned" clause. There is no other contract. In *Toyo Kisen* v. *W. R. Grace & Co.* (9th Cir. 1931), 53 F. 2d 740, affirming 48 F. 2d 850 (D. C. N. D. Cal., S. D. 1931), a prior written contract between the shipper and the ocean carrier eliminated the "freight earned" clause from the bill of lading. The Court found that if there is any irreconcilable repugnancy between a prior written contract between the shipper and ocean carrier and bills of lading, it must be resolved in favor of the former. Similarly in *Pope & Talbot, Inc.* v. *Guernsey Westbrook* (9th Cir. 1947), 159 F. 2d 139, the Court construed an acceptance of a C. I. F. contract for the purchase of lumber together with a bill of lading and held that in view of the ambiguity of the typed and printed form portions of the contract the "freight earned" clause of the bill of lading was inapplicable. The decision of the Court of Appeal of England in *G. H. Renton & Co. Ltd.* v. *Palmyra Trading Corporation of Panama*, [1956] 1 Q. B. 462 is in complete harmony with the decision below.

Conclusion

For the foregoing reasons we respectfully submit that the petition for a writ of certiorari should be denied.

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September, 1956

APPENDIX A

Statutory Provisions from the Carriage of Goods by Sea Act, Act of April 16, 1936, 49 Stat. §§ 1207-1213, 46 U. S. C. A. §§ 1300-1315:

"* * * Nothing in this chapter and section 25 of Title 49 shall be held to apply to contracts for carriage of goods by sea between any port of the United States or its possessions, and any other port of the United States or its possessions: Provided, however, That any bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea between such ports, containing an express statement that it shall be subject to the provisions of this chapter and section 25 of Title 49, shall be subjected hereto as fully as if subject hereto by the express provisions of this chapter and section 25 of Title 49 * * *" 49 Stat. 1212, 46 U. S. C. A. 1312.

* * * * * * *

"(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—* * *

"(j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: Provided, That nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts; * * *" 49 Stat. 1210(2) (j), 46 U. S. C. A. 1304 (2) (j);

* * * * * * *

"Deviations"

"(4) Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of this chapter or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom: Provided, however, that if the deviation is for the purpose of loading or unloading cargo or passengers it shall, prima facie, be regarded as unreasonable." 49 Stat. 1210(4), 46 U. S. C. A. 1304 (4)

APPENDIX B

Clause 6 of the bill of lading provides:

"In case of the happening of any matter or event whether existing or anticipated before the commencement of or during the voyage which in the judgment of the Carrier or Master is likely to give rise to risk of capture, seizure, detention, damage, delay or disadvantage to or loss of the vessel or any part of the cargo, or to make it unsafe, imprudent, or unlawful for any reason to proceed on or continue the voyage, or to enter or discharge the cargo at the port of discharge, or to give rise to delay or difficulty in arriving, discharging at or leaving the port of discharge, the master, either with or without proceeding toward the port of discharge or entering or attempting to enter or discharge the goods there may proceed or return to or stop at such place as he or the Carrier may consider safe or advisable under the circumstances, once or oftener in any order or rotation and there discharge the cargo or any part thereof, and when so discharged the cargo shall be at the risk and expense of shippers and/or consignees or receivers, and delivery thereof by the Carrier shall be considered complete and the Carrier shall be freed from any further responsibility in respect thereof; or if the Master considers it advisable he may retain the cargo on board until the return trip or so long as the Carrier thinks advisable. For any services rendered to the goods as hereinabove provided, the Carrier shall be entitled to a reasonable extra compensation above the full bill of lading freight. If the vessel arrives at the original port of discharge and is prevented or delayed by quarantine from discharging the goods at the usual place of discharge, the Carrier forthwith and without notice may discharge the goods into any depot, lazaretto, craft or other place and such discharge shall be a complete delivery under this contract and all expenses thereby incurred with respect to the goods shall be for ac-

count of the goods. The forwarding of cargo from a port of distress or other place where there has been a forced interruption or abandonment of the voyage shall be at the expense of the shipper and consignee of the goods, who shall be jointly and severally liable for all freight and charges and expenses of every kind whatsoever whether payable in advance or not that may be incurred by the cargo in addition to the original freight, whether the services be performed by Carrier's own vessels or by strangers, and all such expenses and charges shall be due and payable day by day immediately when they are incurred."

Clause 11 of the bill of lading provides:

"Any freight or other charges advanced by Carrier and any expense incurred by Carrier for Cargo Owner's account, shall become immediately and irrevocably due from and repayable by Shipper. Freight, whether prepaid or collect, becomes wholly due and belongs absolutely to Carrier as soon as the Goods are received by Carrier, and shall be deemed earned, and if prepaid shall not be returnable, and if collect shall be payable, ship and/or cargo lost or not lost. Full freight is payable on damaged and unsound Goods, whether deliverable in specie or not. Carrier may sell or dispose of perishable property for Shipper's account whenever in Carrier's opinion same would become decayed or deteriorated before it could be delivered. In such case full freight and all charges shall be deemed earned and shall be payable by Shipper as above."